No. 4838.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California,

Plaintiff in Error,

vs.

Edith Ames English, Executrix of the Estate of Annie B. Ames, Deceased, and Edith Ames English,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

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BRIEF OF DEFENDANTS IN ERROR.

"The right to own property, to grant it, and to dispose of it by will is within control of states, not of nation."

Frew v. Bowers, 12 F. (2d) 625.

(All italics ours.)

STATEMENT.

Briefly the stipulated facts are: That prior to September 8, 1916, being the date that our national government embarked upon the taxing of estates as a means

of revenue in this decade, the will of Charles L. Ames, who died on the 24th day of February, 1915, was admitted to probate, the will having been executed on the 19th day of June, 1909, more than six years preceding the enactment of the law under which the question here presented must be determined. In his will, we find among other things this paragraph:

"I give, devise and bequeath all my property, real, personal and mixed, in fee simple title, and wheresoever situated, to my wife, Annie B. Ames and to my daughter Edith Ames English, to be held by them as joint tenants and not as tenants in common, to them and the survivor of them and the heirs of such survivor forever." [R. p. 25.]

No question is here made as to any tax on the estate of Charles L. Ames, deceased, but the government contends that as Annie B. Ames, one of the joint tenants aforesaid, died on the 15th day of May, 1918, after the enactment of the Revenue Act of 1916, one-half interest in the joint tenancy estate received under the provision of the will aforesaid is subject to Federal Estate taxation in her estate.

The Statute.

The sections of the Revenue Act of 1916 with which we are directly concerned are as follows:

> "Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of

this act, whether a resident or nonresident of the United States:

"One per centum of the amount of such net estate not in excess of $50,000."

Then follow a graduated scale of percentages.

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * * *

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The Law.

At the outset an examination should be made of the substantive law of the state of California, for in determining the authority or power of the Federal government to exact a tax on transfers of property, the law of the domicile of decedent is important if not persuasive.

"What is property and what is a part of the estate of a decedent is determined by the law-making power of the state. * * *

Congress, it is true, cannot change the law of property in the states."

Fidelity Trust Company v. McCaughn, 1 F. (2d) 987.

The right to transmit or succeed to property at death is a state given right not a federal right, and it is only by the privilege granted by the state to the citizen to dispose of property at death that an heir may succeed to the property of an ancestor. Should the state deny this privilege and cause all property upon the death of the owner to escheat to the state, then the federal government's inheritance tax would become inoperative insofar as that particular commonwealth is concerned; authority for this proposition we cite the recent case of

Stebbins v. Riley, 268 U. S. 137.

Therefore, we contend that if the Legislature of the state of California has not power or authority to make its State Inheritance Tax Act retroactive so that the interest in property which had previously vested subject only to a contingency, which contingency might happen during the life of the statute, certainly no greater power exists in our Federal Congress. The limit of authority of a California Legislature in this regard is indicated by the case of *Hunt v. Wicht,* 174 Cal. 204:

> "Concededly such a transfer may be taxed by the state. The difficulty in the case at bar is that at the time the deed was so executed and delivered to Mathilde Wicht in escrow there was no law imposing any tax on such a transfer as was here made. * * *"
>
> "We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a present title in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (Estate of Cornelius, 151 Cal. 550 (91 Pac. 329)) of this prop-

erty in fee simple absolute, subject only to this life interest. Could the Legislature subsequently lawfully impose a succession tax upon this fully executed transfer of title, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life esate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. *The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible,* and the Legislature could not thereafter lawfully destroy, impair or burden this property right under the guise of a succession tax on account of the transfer."

In determining the *quantum* under the Federal Estate Tax Act of exemption allowable to a California estate by reason of our community property system, the federal courts in the case of *Blum v. Wardell,* 276 Fed. Rep. 226, and in *Robbins v. United States,* 5 Fed. Rep. (2d)

690, looked only to the statute or the substantive law of California, limiting the right to enforce its tax by the law of this state.

The Substantive Law of the State of Decedent's Domicile at Time of Death Governs the Interest in the Estate of a Testator for the Purpose of the Federal Estate Tax Law and the Federal Government in Placing a Tax Upon the Devolution of Property at Death Can Only Be Co-Extensive With the State Privilege Which Affords the Right to Succession.

Both at common law and under the Civil Code of California, the legal effect of a joint tenancy in property is that the title to the joint property does not pass to and vest in the surviving tenant upon the death of his co-tenant, but that either tenant is seized of the whole estate and each and every atom and part thereof from the first or the time of the creation of the joint tenancy and no change occurs in his title upon the death of his co-tenant.

The identical question at issue here has been before the Supreme Court of California, that court holding that the Legislature of the state of California could not place an inheritance tax burden on an estate of a joint tenant who died after the enactment of a taxing amendment to the Inheritance Tax Act if the joint tenancy had been created prior to the enactment. We refer to the case of *Estate of Guernsey*, 177 Cal. 211. The syllabus reads:

> "Both at common law and under the Civil Code of California the legal effect of a joint tenancy is that the title to the joint property does not pass to and

> vest in the survivor, upon the death of his cotenant, but that each tenant is seized of the whole estate from the first, and no change occurs in his title on the death of his cotenant. * * *"
>
> "The question of liability to inheritance tax must be determined by the law in force at the time title vests by virtue of a transfer."

In the *Estate of Potter,* 188 Cal. 55, the Supreme Court of California held that the California Inheritance Tax Act cannot be given a retroactive effect upon transfers vesting prior to its passage, so as to increase the tax thereon, and an attempt to do so would be void.

Paragraph one of the syllabus of the case of *Pennsylvania Company et al. v. Lederer,* 292 Fed. 629 reads:

> "Interest in the estate of a testator for the purpose of the Federal Tax Law, are determined by the laws of the state in which the testator was domiciled at the time of death."

We have no quarrel with the proposition that the Federal Government, with its delegated powers from the sovereign states, may impose certain conditions upon the succession of property, but we insist that the right of the Federal Government in the collection of its tax to interfere wth vested rights in property, inaugurate or change the laws of succession or to interfere with or foreclose the sovereign state from the collection of its inheritance tax can only be maintained by an express constitutional grant, which delegation has never been made by the states.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the

states, are reserved to the states, respectively, or to the people."

10th Amendment to the Constitution of the United States.

The Facts of This Case Bring It Without the Language of the Statute for Upon the Death of Annie B. Ames There Was No Transfer of Her Interest Within the Language of the Statute.

Sec. 201. "That a tax * * * is hereby *imposed* upon the *transfer* of the net estate of every decedent."

An analysis of the section indicates that a transfer is necessary for the imposition of the tax. Unless there was a transfer of the one-half interest in the joint tenancy estate upon the death of Annie B. Ames to Edith Ames English the government must fail. As the statute imports, it is an excise on the transmission or *transfer* of property from a decedent to those chosen to take. That which is taxed is the right or privilege of transmitting property.

"Confusion of thought may arise unless it be always remembered that fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is *the subject levied upon by death duties.* * * * No property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

Knowlton v. Moore, 178 U. S. 41.

In the case of *Edwards v. Slocum,* 264 U. S. 61, Mr. Justice Holmes said:

> "This is not a tax upon a residue, it is a tax upon a transfer."

The government on page 6 of its brief says "the statute is founded not upon the acquisition of rights by the decedent, but the cessation of his rights at death."

The statute expressly imposes the tax upon the *transfer,* and as the only transfer in connection with the joint tenancy estate was the transfer in the will of *Charles L.* Ames, it would seem that the case of *Estate of Guernsey, supra,* would for all times foreclose any doubt as to the complete and unlimited ownership of each joint tenant in a joint tenancy estate, so well settling this principle under the laws of the sovereign state of California that no "confusion of thought may arise." We quote from the final paragraph of the opinion in that case:

> "The agreement determined the persons who had the right of control of the property, and by its terms the wife had as full control as the husband. Upon the death of either the property remained, and all of it remained, the property of the survivor, as it was, in contemplation of law, from the time of its creation."

The many pages that the Government has devoted in its brief to the proposition that its tax is not upon the *transfer* or passing of property but upon the *cessation* of an interest, was exploded we would have presumed for all time, by the well reasoned opinion in *Lynch v. Congdon,* 1 F. (2d), 133-135:

> "It is the theory of plaintiff in error that the tax is not upon the transfer of property included in the gross estate, *but upon the cessation of decedent's interest in these deposits;* that it is not a question

> of transfer from a joint depositor to the surviving joint depositor; that there is in fact no such transfer, each depositor being an owner of the entire interest in the entire property during their joint lives, and therefore there is no passing of property from decedent to the survivor, but merely a cessation of decedent's interest in the property; that such property is the same as any other property, and that Chester A. Congdon had the entire interest in the same, and that it ceased by reason of his death. However interesting and debatable as a matter of first impression this theory may be, we think consideration of it foreclosed by the decision of the Supreme Court of the United States in Shwab v. Doyle, 258 U. S. 529, 42 Sup. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454 and companion cases."

Claims of unlimited scope are made for the tax imposing provisions of the Revenue Act, but it is not certain if the government claims the act has the effect of substantive law or that it can supersede the law of the state of California, making all joint tenancies whenever created in fact tenancies in common and thus causng a transfer of one-half of the tenancy at the time of death of a co-tenant.

Knowlton v. Moore, supra, is cited and the principle of the case reaffirmed in the case of *New York Trust Company v. Eisner,* 256 U. S. 345,

> "For if the tax attaches to the estate before distribution, if it is a tax on the right to transmit, or on the transmission at its beginning obviously it attaches to the whole estate."

Again in *Frew v. Bowers*, 12 Fed. (2d) 625:

> "It is not on the transfer of 1910; and at that date there was no tax burden of any kind upon what Mr. Nash then did. It is not laid because Mr. Nash died owning or having any testamentary power over what he parted with in 1910. The statute does not pretend to declare *ownership*, and it could not if it would; for the right to own property, grant it, and dispose of it by will is a matter for the states, and not the nation. * * * "

In the case of *Lynch v. Congdon, supra,* the identical point here presented was decided adverse to the government, the facts paralleling the facts in the instant case. We quote from the opinion:

> "The sole question presented in this: Did the money deposited in the two banks by Chester A. Congdon to the joint account of himself and Clara B. Congdon, or the survivor, prior to the passage of the Estate Tax Act of 1916, constitute a part of the gross estate of the decedent, Chester A. Congdon, within the purview of subdivision (c) of Secton 202 of the Revenue Act of 1916, 39 Statutes at Large, 756 (Comp. St. S6336½c), known as the Estate Tax Act? Said section is as follows. * * *"

On these facts Mr. Circuit Judge Kenyon said:

> "* * * The status of Clara B. Congdon, the wife, and her right in the joint deposits, were fixed before the passage of the Tax Act by the Congress * * *."
>
> "* * * The arrangement gave to her a present joint ownership of the funds represented by the certificates, and the right of sole ownership if she survived him. This transaction was complete be-

> fore the passage of the act. Unless the act providing for such tax is retrospective in its operation the tax assessed and collected was invalid. The Supreme Court has settled this question as to this very act in Shwab v. Doyle, 258 U. S. 529, 536, 42 Sup. Ct. 391, 393 (66 L. Ed. 747, 26 A. L. R. 1454). From the opinion we quote: 'We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of Congress, and have resolved that it should not be construed to apply to transactions completed when the act became a law.' "

In Munroe v. U. S., 10 Fed. (2d) 230, the court said:

> "The one-half interest of a surviving spouse which under the laws of Nebraska becomes absolute by operation of law upon the death of the other was held not subject to the Federal estate tax."

Although quotations are found in the government's brief from subsection (c) of section 202, no reference is made to the exception noted in subsection (c), to-wit:

> "Except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

Since the interest and ownership in the whole of the joint tenancy was absolute in each tenant from the time of creation, and the surviving tenant takes not by succession but by original grant, it follows that all of the joint tenancy estate *originally belonged* to the surviving tenant. Certainly the one-half which the government might take *never* * * * *belonged to the decedent.*

It is an anomaly to lay a present excise tax or a transfer tax on a privilege which was exercised long before the tax existed. There is just as much authority and logic for the government to tax the whole of the joint tenancy estate here involved as a one-half interest therein, for neither the deceased or the surviving tenant contributed any part to the creation of the estate. It came to them through the will of Charles L. Ames, and the expression of subsection (c) of section 202 would exempt from tax that part of the joint tenancy estate that may be shown to have originally belonged to such other or surviving person and never to have belonged to decedent. Certainly in the instant case it cannot be said that any part of the joint tenancy estate originally belonged to Annie B. Ames, deceased, and therefore placing a fair construction on the section, it follows as no interest n the property which "originally belonged" to the said Annie B. Ames passed upon her death no tax should attach.

Estate of Huggins, 139 N. E. (N. J.) 442, is a case involving the taxability of a joint tenancy, although the court determined the interest in the joint tenancy estate to be taxable upon the death of a co-tenant, it based its decision on the fact that the *tenants themselves created the estate,* and the tenants' action in so creating the estate amounted to a testamentary gift to the survivor. The court ably distinguished this case from a case where property is conveyed by another to two persons in joint tenancy, where the deceased tenant did not create or participate in the creation of the joint tenancy, in such instances there would be no taxable transfer under the New Jersey law upon the death of one of the tenants

as the deceased contributed nothing to the joint tenancy estate. It would seem that Congress contemplated just such a situation as this in writing subsection (c) of section 202 of the Act.

The New Jersey case makes a differentiation by a court decision while Congress has made a distinction, and exempted from tax joint tenancy estates, where the deceased joint tenant did not participate in the creation of the joint tenancy.

On page 8 of the government's brief we find

> "The tax is imposed upon the transfer of the net estate."

In considering this statement it must be remembered that the property herein involved in the joint tenancy estate was not listed in the inventory, nor did it pass at death to the executor, nor was it in any wise administered upon in the estate of Annie B. Ames, deceased. The right of the surviving tenant continued unimpaired by reason of the previous grant in the will of Charles L. Ames, deceased. There was no transfer by reason of the death of Annie B. Ames. Hence this property did not pass at death and it cannot be seriously argued that the government could arbitrarily measure its tax on the property passing in an estate by considering foreign factors, thus a fixed and vested interest, before its law was contemplated, to augment the tax and thus place a greater tax burden upon one estate than on another where a like value of property has passed?

> "To measure the tax which the estate of one person should pay by the value of the estate of another person deserves as a scheme of taxation all

the censure which counsel for defendant has heaped upon it."

Pennsylvania v. Lederer, 292 Fed. 629.

The Court Will Not Enlarge or Extend the Legislative Language to Meet a Circumstance Not Specifically Falling Within Its Provisions.

The levy and assessment of taxes by the sovereign power is of purely statutory origin. Whether a tax is or is not due depends upon the construction given to the language of the statute. The government has been told by Federal courts on many occasions that the statute here involved is not broad enough to cover such a case as the one at bar. It should not now be heard to ask this court to stretch the law. There is no language in the 1916 Federal Estate Tax Act that would indicate Congress intended the law to have a retroactive application and to attach to transactions completed prior to the enactment of the statute.

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen."

Gould v. Gould, 245 U. S. 151.

"In case of doubt revenue statutes are construed against the government and in favor of the citizen."

United States v. Hurst, 2 Fed. (2d) 73.

"No construction should be given a statute which would make its application impracticable, unfair or unreasonable."

Estate of Mary Emilie Parrott, 72 Cal. Dec. 108.

"The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. * * *"

Wilkinson v. Mutual Building and Savings Association, decided by Circuit Court of Appeals, Seventh Circuit, June 2, 1926.

"Statutes levying taxes are not to be extended by implication beyond the clear import of the language used."

United States v. Merriam, 68 Law Ed. 48.

Congress Is Without Power to Measure Its Estate Tax on a Present Particular Occasion by Past Transactions Consummated Prior to the Adoption of the 1916 Revenue Act.

In considering the cases cited by the government, attention must not be directed from the fact that we are not here dealing with *transfers* taking effect at death or with a transaction where the enjoyment of property has been deferred in the grantor until death. Further that the question here presented must be determined by the Revenue Act of 1916, which Act the highest court of the nation has construed as not being retrospective. Cases in which the 1918 or 1921 Acts have been adjudged as applying to past transactions are not authority here, for Congress in 1918 amended the Revenue Act that its provisions might attach to transfers whenever made providing the decedent died after the amendment.

The government makes reference to the case of *Safe Deposit & Trust Company v. Tait,* 295 Fed. 429, contending that this case is authority for their right to tax transactions completed before the adoption of the law. In this case, the decedent died March 19, 1919, therefore it is not wholly in point here. We do, however, believe that the following language from the opinion fully sustains out contentions in the instant case:

> "It is contended that the deed of trust created an equitable tenancy by the entirety in Mr. and Mrs. Albert. The decision of Shwab v. Doyle, 258 U. S. 529, 42 Sup. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454, is conceded by the government to be decisive, if such a tenancy was created. Since section 402, subd. 'd', subjecting such an interest to the tax, has no clear statement to the effect that it applies to tenancies created before the act, it must be held to apply only to those created after the act.
>
> "A tenancy by the entireties is created by a conveyance to husband and wife, whereupon each becomes seized and possessed of the entire estate, and after the death of one of the survivor continues to take the whole."

The cases of

Walker v. Grogan, 283 Fed. 530, and
Knox v. McElligott, 258 U. S. 546,

are not controlling, since in each case at the time of the creation of the tenancy the deceased was the owner of all the created joint tenancy estate. Further the question as to when the *transfer* took effect or if any part of the joint tenancy was taxable upon the death of a cotenant was not litigated, since for some undisclosed

reason the taxpayers voluntarily included in its return for tax one-half interest in the joint tenancy. The language of Mr. Justice McKenna in *Knox v. McElligott* plainly forecloses the government from assessing a tax on any portion of a joint tenancy created prior to the enactment of the statute (except with the consent of the taxpayer).

> "It is true §201 provides that the tax is imposed upon the transfer of the net estate of 'every dedecedent dying after the passage of this act;' but the assumption must be that this relates to estates thereafter created, and not to then-existing property." * * *
>
> "From the structure of the act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had, in his lifetime. * * *"

In *Walker v. Grogan,* which arose in the state of Michigan, no consideration was given in the opinion to the statutory law or decisions of the courts of Michigan. Whether or not no additional interest passed to the surviving tenant under the Michigan law upon the death of a co-tenant, as is the case under the California law, we are not advised.

In a recent opinion the Circuit Court of Appeals, Second Circuit, said:

> "Where decedent, 12 years before his death, transferred securities then valued at $200,000 to trustees of his deceased wife's estate, by the use of which the trustees at the time of decedent's death had accumulated securites worth $500,000, ***held,***

such $500,000 was not to be included as part of decedent's gross estate, taxable under Revenue Act 1921, §§401, 402 (Comp. St. Ann. Supp. 1923, §§6336¾b, 6336¾c), since such construction would render section 402 unconstitutional."

Frew v. Bowers, supra.

"No language, however, was inserted in the Revenue Act of 1918 to indicate that section 402(d)" (being the same as section 202(c) of the 1916 Act) "was intended to apply retroactively. A statute should not be given a retroactive operation unless its words make that imperative."

Appeal of Hannah M. Spofford, Decision No. 1311, Board of Tax Appeals.

The District Court of Massachusetts held the retroactive provisions of section 402(c) of the 1918 Revenue Act unconstitutional.

"The right to impose a tax carries with it the right to adopt all reasonable measures to prevent an evasion of the tax. On this ground the power to measure an estate tax may properly be extended to gifts in contemplation of death or gifts to take effect after death, because both are transfers in the nature of testamentary dispositions, and could be easily resorted to for the purpose of evading the tax. *I entertain, however, grave doubts whether such power could be reasonably extended to such a transfer if completed before the effective date of the law.*"

Coolidge v. Nichols, 4 Fed. (2d) 112.

The theory advanced by the Government to sustain its tax in the instant case that it may place any reasonable

burden on the privilege of succession and that a death duty statute can properly include such joint tenancy property as a measure of the tax payable by the estate for the decedent's privilege of disposing of his property by will or intestacy, was repudiated in the appeal of the case of

McElligott v. Kissam, 275 Fed. 545,

this being the theory adopted by the Circuit Court of Appeals for its decision, but the case was reversed and the theory nullified by the United States Supreme Court. See

Knox v. McElligott, supra.

Although this identical question has been before the state and Federal courts on innumerable occasions, we are unable to find any case that would warrant the Federal government in assessing a tax under the Revenue Act of 1916 on property which had absolutely vested prior to the enactment. In the case of

Blount v. United States, 59 Court of Claims, 328,

which has to do more particularly with a tenancy by the entirety, which system of property tenure is not recognized by the California Codes, the court held that the 1916 Revenue Act could not attach to a tenancy by the entirety or to a joint tenancy created prior to the enactment. At page 347, the court says:

> "It follows that the tax should not be assessed against the estate of tenants by the entirety because the wife did not take as upon a transfer from the husband at his death, but took under the original grant, his estate ceasing. We think it doubtful

whether subdivision (c) of section 202 contemplates estates by the entirety in their technical sense. It speaks of an interest held jointly, or as tenant in the entirety by the decedent, 'and any other person'. Only an estate held by the husband and wife could be held by the entirety. It seems to us this language applies to an interest that passes as part of the estate; that is, an estate held jointly or *per my et per tout,* by the moiety and by the whole. Giving effect to the stipulation as to the character of the estate, the plaintiff should recover the amount of the tax collected by the commissioner upon the lands conveyed to the husband and wife, except as it is affected by her return."

The case of *Lewellyn v. Frick,* 268 U. S. 934, involved the taxability of certain life insurance policies taken on the life of the late Henry C. Frick before the date of the statute, some of the policies were payable to his estate, all premiums were paid by Mr. Frick, there was unquestionably a *cessation of interest* upon his death and the beneficiaries received the principal of the policies by reason of the death. We find on page 6 of the government's brief:

"Since, however, the statute is founded not upon the acquisition of rights by the decedent, *but the cessation of his rights at death.* * * *"

What is the distinguishing features that would cause a tax to attach because of a *cessation of interest* upon the death of a co-tenant, where under a state law all rights and interest in a joint tenancy estate are fixed and vested by the original grant and not altered by the

death of such co-tenant and exempt from the Act a policy of insurance payable to an estate and solely during life under the control of deceased, the interest in which is dependent and in so far as the estate is concerned fixed and vested only at death? We find in the opinion of Mr. Justice Holmes in the Frick case:

> "In view of their liability, the objection cannot be escaped by calling the reference to their receipts, a mere measure of the transfer tax. The interest of the beneficiaries is established by statutes of the states controlling the insurance, and is not disputed. * * *"
>
> "There would be another if the provisions for the liability of beneficiaries were held to be separable, and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind. Panama R. Co. v. Johnson, 264 U. S. 375, 390, 68 L. Ed. 748, 754, 44 Sup. Ct. Rep. 391. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that, if known, might have induced those concerned to avoid it, and to use their money in other ways. * * *"

The expression of the United States Supreme Court is in unmistakable language concerning the theory here advanced by the government.

"Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact. * * *"

"But granting the contention of the defendant has plausibility, it is to be remembered that we are dealing with a tax measure, and whatever doubts exist must be resolved against it. * * *"

"We need only say that we have given careful consideration to the opposing argument and cases, and a careful study of the text of the act of Congress, and have resolved that it should be not construed to apply to transactions completed when the act became a law. And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative, and this cannot be said of the words of the Act of September 8, 1916."

Shwab v. Doyle, supra;

Union Trust Company v. Wardell, 258 U. S. 535;

Levy v. Wardell, 258 U. S. 541.

The principle here at issue is ably treated in the chapter on Joint Estates beginning at page 150, in the 1926 publication of Pinkerton & Millsaps on the subject of Inheritance and Estate Taxes. At page 152 we find the following:

"§192. Theories of Inheritance Taxation. There are four theories in regard to the levying of death duties upon the vesting of title in the survivor at the death of a joint tenant. These are as follows:

(1) That the property passed at the time of the creation of the joint estate and consequently already belonged to the survivor, the transfer being, therefore, not taxable.

(2) That each of the joint tenants has an interest in the property to the extent of an equal share with each of the other joint tenants (a one-half interest in the case of each of two), and that the transfer of the other fractional part is therefore taxable.

(3) That each of the joint tenants had an interest in the property to the proportionate extent to which he contributed to its cost, and that the transfer of the other part is therefore taxable.

(4) That the survivor acquires undisputed title to the property by virtue of the death of the other joint tenant, and that the transfer is therefore taxable in full."

In paragraph 1 above, it may be noted that the author specifically exempts from tax joint tenancies where the law provides that the vesting of title is concluded at the time of the creation of the tenancy.

In conclusion, the right of the government to exact a tax is prohibited by the Constitution of the United States, (a) as an unlawful interference with the rights of the states to regulate descent and distribution; (b) an unjustifiable taking of private property without due process of law; (c) the exaction of a tax upon property of one person because of the death of another; (d) a direct tax not laid in proportion to the census and enumer-

ation of the states; (e) a taking of private property for public purposes without just compensation; (f) the measure of the tax would produce profound inequality between surviving joint tenants who were beneficiaries of an estate and surviving joint tenants who were not beneficiaries. It is submitted that the tax liability determined by the Commissioner of Internal Revenue in the instant case was unlawful, not within the provisions of the Federal Estate Tax Act and contrary to the expressed inhibitions of the Constitution of the United States, and therefore the judgment should be affirmed.

Respectfully submitted,

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Dated: September 29th, 1926.